INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 267

THE UNITED STATES OF AMERICA, APPELLANT

v.

FREIGHTS, SUB-FREIGHTS, CHARTER HIRE, AND/OR Sub-Charter Hire of the S. S. "Mount Shasta"

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION OF THE COURT BELOW

The opinion of the District Court (R. 29) is reported in 291 Fed. 92.

JURISDICTION

The decree to be reviewed was entered March 17, 1925. (R. 29.) This direct appeal was taken March 21, 1925. (R. 32.) The certificate of the Judge (R. 33) is—

> that the judgment of dismissal herein is based solely on the ground that the sub-freights alleged to be due do not constitute

a sufficient res to support an action in rem, and that therefore the case does not come within the admiralty jurisdiction of this court.

The jurisdiction of this Court is based on Section 238 of the Judicial Code as it stood prior to the effective date of the Act of February 13, 1925 (c. 229, 43 Stat. 936).

QUESTION INVOLVED

The question presented for determination by this Court is as follows:

Where a charter party provides that the shipowner shall have a lien upon all cargoes and all subfreights for any amounts due thereunder and the owner files a libel in admiralty to recover such subfreights, does (1) the assertion in good faith of a counterclaim or offset for damages alleged to have been incurred by the cargo owner by a breach of the contract of carriage, equaling or exceeding the amount of unpaid freight, and or (2) a bona fide denial of liability therefor deprive the court of jurisdiction on the ground that the res thereby becomes extinguished?

STATEMENT OF THE CASE

The United States, as owner of the S. S. *Mount Shasta*, filed a libel *in rem* in admiralty in the United States District Court for the District of Massachusetts, alleging that hire in the amount of $289,680 was overdue from the Mount Shasta

Steamship Company [1] as charterers of the ship, and seeking to reach in payment thereof certain freight moneys due the latter from the subcharterer, Palmer & Parker Company (R. 1–4), and praying (R. 3–4):

> Wherefore the United States claiming a lien upon said freights, sub-freights, charter hire and/or sub-charter hire in the sum of two hundred and eighty nine thousand six hundred and eighty dollars ($289,680) now due it and unpaid as above set forth, prays that process in due form of law may issue against the freights, sub-freights, charter hire, and/or sub-charter hire of said steamship "Mount Shasta" and against all persons interested therein, and that a monition may issue against the said Palmer & Parker Company and against all other persons in interest, commanding it and them to pay the said freight money into court; that all persons interested therein may be cited to appear and answer under oath in the premises and that this honorable court may be pleased to pronounce for the aforesaid damages and costs, and for such other and further relief as to justice may appertain and as this court is competent to give in the premises.

It was alleged (R. 1) in the libel that on May 19, 1920, the vessel was demised for a period of thirteen months by a charter containing the provision that—

[1] The libel originally named Victor S. Fox & Co., Inc., as charterer. (R. 1.) A motion was filed substituting the Mount Shasta Steamship Co. (R. 11), which the court found to be the principal (R. 29).

> The owner shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter party. (R. 2.)

It was also alleged that on July 14, 1920, a subcharter was entered into with Palmer & Parker Company, of Boston, for the carriage of a cargo of mahogany logs from the Gold Coast of Africa to Boston, that the carriage was performed, and that a substantial amount of freight was due as a result. (R. 2-3.)

It was further alleged that charter hire was overdue to the amount of $289,680, and the establishment of a lien was sought against the subfreights, in the hands of Palmer & Parker Company, for the payment thereof. (R. 3.)

Upon the filing of the libel a warrant and monition issued requiring notice "to all persons concerned" and ordering the marshal, among else—

> to take said freights, sub-freights, charter hire, and/or sub-charter hire into his custody (R. 4)—

and the marshal made a return that he had given notice as directed and had served it upon Palmer & Parker Company. (R. 5.)

The United States, representing that "Palmer & Parker Company not having paid any of the said moneys into court," moved for an order to enforce the same. (R. 11.) This motion came on to be heard (R. 12), at which time the Palmer & Parker

Company filed a paper styled a "special appearance," wherein it denied—

> that there is now in its hands and possession, any sum of money or any fund to which the libellant may in any wise lay claim—

and denied—

> that it is in any wise a party to this cause and says that in this cause this honorable court has no jurisdiction over it. (R. 13.)

In opposition to a motion that the libel be taken *pro confesso* and that it be defaulted for failure to answer the libel and the interrogatories, it again appeared by a paper styled a "special appearance and objection" and set up that if the United States had any claim it should have been enforced in an action *in personam* and again denied the court's jurisdiction. (R. 14–15.) The court ordered the company to answer. (R. 15.)

In its answer Palmer & Parker Company admitted the allegations of the libel as to the ownership of the *Mount Shasta* and that she was chartered on the terms alleged. (R. 16–17.) It was conceded that the Palmer & Parker Company had chartered said vessel for the voyage from Africa to Boston. (R. 17.) Various acts of default on the part of the charterer whereby the arrival of the vessel at port of discharge was greatly delayed to the damage of Palmer & Parker Company and whereby they were obliged to make certain advances to the Captain of the ship to facilitate the voyage were charged. (R. 18–19.) At the time the

vessel arrived at Boston it was asserted that the affairs of the charterer were in the hands of a receiver. (R. 19.)

It was further alleged that, though the discharge of the cargo was completed on March 7, 1921, no demand was made by the libellant for the payment of the subfreights until the libel was filed on March 23 (R. 19) nor any attempt made to withdraw the vessel from the possession of the receiver until June.

It appeared from the pleadings—and particularly from the answers to the interrogatories propounded by libellant (R. 11–12)—that the Palmer & Parker Company paid no part of the freight earned by the vessel other than the estimated payment of 50%, or $52,500, on advice that the cargo of logs had been put aboard at loading ports in Africa (R. 26–27).

The Palmer & Parker Company denied any liability for freights (R. 20) or the existence of any basis for a proceeding *in rem* (R. 21–22) and asserted that the court was without jurisdiction to entertain the libel.

The case was heard by the District Court "only upon the question of jurisdiction." (R. 29.) From the stipulation filed and the recitals of the opinion, it appears that proof was offered and received *solely on the question of whether the defenses asserted were not merely colorable and interposed in good faith*. It is apparent that there was no

hearing of any sort on the merits. The respective claims of the parties are thus summarized by the court (R. 30):

> The Government contends that there is due to the steamer under the cargo-charter about $37,000 freight money and $12,000 demurrage; and that by the terms of its charter it is entitled to maintain a suit in rem against these moneys in the hands of Palmer & Parker Company. Palmer & Parker Company, on the other hand, contend that the steamer was unseaworthy and that this defect and deviation and delay caused damage to an amount largely in excess of the unpaid freight money; that no freight money is due; and that there is therefore no res and no basis of jurisdiction.

The court decided that there was no jurisdiction and dismissed the libel. The basis for the decision is contained in the following excerpt from the opinion (R. 30):

> I assume, as contended by the libelant, that freight-money due and payable constitutes a res of which an admiralty court has jurisdiction; but to have that effect the freight-money must be actually due and liability for it must I think either be admitted by the person charged, or must be so clear and obvious as to leave no room for bona fide denial. The mere assertion that freight is due from a certain person, denied in good faith by the party charged, does not, it seems to me, create a res within the jurisdiction of

> the admiralty court. Such a claim might be made the basis of a suit. But a claim is not a res in this sense. * * * The res is in the nature of a fund in controversy. It must exist when the suit is begun or there is no foundation of jurisdiction. And the court can not assume that freight money is due in order to draw to itself jurisdiction to determine whether that assumption is correct.

SUMMARY OF ARGUMENT

(1) The provisions of the charter party that "the owner shall have a lien upon all cargoes, and all sub-freights for any amount due under this charter party" created a lien upon the subfreights for the benefit of the shipowner which could be enforced by a proceeding *in rem*.

The libel in this case was instituted in conformity with the practice defined in the authorities and contains full jurisdictional allegations.

(2) The jurisdiction of the court attached upon the filing of the libel containing the requisite jurisdictional allegations and was perfected upon the issuance of a monition and its service upon the cargo owner, Palmer & Parker Company. Thereafter the right of the court to proceed and hear the case on the merits was not defeated by the mere filing of defensive pleadings, although presented with the utmost good faith.

The decision of the court below to the effect that a mere bona fide denial of liability for freight by

the cargo owner and the mere bona fide assertion of a coextensive counterclaim operated to extenguish the *res* and defeat the jurisdiction of the court to proceed to hear the case upon proof adduced in support of the libel and answer was error. Such a ruling is opposed to the authorities and the reasons upon which they depend for support.

(3) The analogy which the District Court attempted to draw from proceedings where a trustee in bankruptcy seeks to recover property in the possession of a third person held adversely to the estate is not well founded. It is further submitted that the reasoning of the court in other particulars in support of the decision is unsound.

(4) The decision of the court below dismissing the libel on jurisdictional grounds was error. The court should have retained jurisdiction and heard the case on the merits.

ARGUMENT

I

THE PROVISIONS OF THE CHARTER GAVE THE SHIPOWNER A VALID LIEN UPON SUBFREIGHTS WHICH COULD BE ENFORCED BY AN ADMIRALTY PROCEEDING IN REM

The provisions of the charter party that "The owner shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter party" present no novelty in shipping documents and maritime practice, and have been held to vest the shipowner with a valid admiralty lien enforci-

ble by an action *in rem*. Once the existence of the lien is conceded, the right to a remedy *in rem* is a necessary corollary upon familiar admiralty principles.

In the case of *American Steel Barge Co.* v. *C. & O. Coal Agency Co.*, 115 Fed. 669, the Circuit Court of Appeals for the First Circuit was called upon to consider the effect of substantially identical provisions in a charter party and sustained the right to proceed *in rem* directly against the subfreights.

In discussing the correct procedure in such a case, at page 674, Judge Putnam said:

> The proper remedy in admiralty, which does not have the strict regard to parties which is had by the chancery courts, is a libel, in the name of the party holding the bottomry bond, or other lien on freight, against the freight. It is not necessary to make party to the proceeding the assignor, or whomsoever has the remaining beneficial interest in the freight, as is required in equity, for the reason that the admiralty has no strict rules as to parties, and because, also, the proceeding being in rem, all the world are parties thereto. In accordance with admiralty rule 38, which only reiterates the uniform and ancient practice of the admiralty, the appropriate primary process is a monition to the holder of the bill of lading, or owner of the cargo, requiring him to pay the freight into the registry of the court. • • • The proper proceeding would have been to file a libel against the subfreight

> alone, naming the party charged with the possession thereof, who in this case was the holder of the bill of lading, or the owner of the cargo, and asking process requiring him to bring into court what would be due from him on discharge of the vessel, all as provided in admiralty rule 38. Then, if the freight according to the bill of lading had not been brought into court, or sufficient cause shown to the contrary, summary process would have issued on a supplemental libel or petition against the holder of the bill of lading, or against the cargo if the lien for freight had not been lost.

This is precisely the practice adopted by the Government in this case. It is submitted that the refusal of a cargo owner to comply with the directions in the monition and to cover the unpaid part of the freight into the registry of the court can not affect the jurisdiction of the court which had attached at the time of the filing of the libel. *Snow* v. *180¾ Tons of Scrap Iron*, 11 Fed. 517.

The doctrine enunciated in the *American Steel Barge Company* case has received universal recognition.

In *Carver's "Carriage by Sea,"* Seventh Edition, at page 930, the author says:

> A lien upon "sub-freights" for charter freight, or hire, is often expressly given. This entitles the shipowner to require payment to himself of freights which may be due to the charterer.

See also—

Freights of the Kate, 63 Fed. 707.

Bank of British North America v. *Freights, etc., of the Ansgar*, 127 Fed. 859; affirmed in 137 Fed. 534.

Larsen v. *150 Bales of Sisal Grass*, 147 Fed. 783.

Actieselskabet Dampsk. Thorbjorn v. *Harrison & Co.*, 260 Fed. 287.

Tagart, Beaton and Co. v. *James Fisher and Sons*, 9 *Asp. 381* (*Court of Appeal*)

In this case, which involved a lien on subfreights given in a time charter party to a shipowner as security for the payment to him of the hire of the vessel, Lord Halsbury said (at p. 384):

> Confining myself to the only question with which I think it is necessary to deal, I am of opinion that it is quite clear that the right—which is an important right, whether it is called a lien or is called by any other name—must be exercised at the time when there is freight to be paid. That really is the short point. If the freight has been paid the lien is gone * * *.

Lord Alverstone also said (at p. 385):

> Putting the matter in my own way, as I understand it, a lien for sub-freight in these time charters means a right to stop freight and receive freight as such, and does not mean the right to follow the proceeds into the pockets of somebody else because the money which has been so received was paid in respect of a debt due for freight.

Doubtless there is a right to hold the cargo under a stipulation in a charter such as here involved, not only as security for any amount due as charter hire, but also as security for the payment of subfreight upon which a lien is imposed.

In this connection attention is invited to the following statement by the court in *American Steel Barge Co. v. C. & O. Coal Agency Co., supra*, p. 674:

> Then, if the freight according to the bill of lading had not been brought into court, or sufficient cause shown to the contrary, summary process would have issued on a supplemental libel or petition against the holder of the bill of lading, or against the cargo if the lien for freight had not been lost.

The loss of the lien on the cargo as result of its delivery to the consignee does not affect, however, the lien upon the subfreights, which persists as long as such freights or any part thereof remain unpaid.

This is illustrated by the case of *The Sarpfos*, 1925 A. M. C. at page 137. In this case the referee in bankruptcy, whose opinion was affirmed by the District Court, said at page 143:

> The charterer, through the trustee, takes the position that the lien in favor of the owner given by the charter party was really only a lien on cargoes, and that no lien on the sub-freights was given. The charterer alleges that when the cargo was delivered at Panama to be forwarded by connecting carrier, the owner lost the lien on the cargo and on the sub-freights at the same time. The

owner claims that the lien on cargoes and on sub-freights are independent of each other; and in this opinion the undersigned referee concurs. The referee is of the opinion that whereas the lien on cargoes is possessory, a lien on freights is not. Both land and water carriers, from the earliest times, have, under the law, been entitled to a lien on cargo carried by them for the freights due to them. The lien was possessory in character and it was lost by the delivery of the cargo, unless some special agreement reserved the lien. In the case at bar it is admitted that when the cargo was delivered at Panama, to go forward by connecting carrier to destination, no lien was asserted. The trustee therefore argues that since the owner's lien on cargo was lost, the lien on the freight was also lost; but such would not seem to be the law. *Freights of the Kate*, 63 Fed. 707; *American Steel Barge Co.* v. *Chesapeake and Ohio Coal Agency Co.*, 115 Fed. 669; *Bank of British North America* v. *Freights, etc. of the Hutton*, 137 Fed. 534. The lien on freights rests on a special agreement giving it.

II

THE JURISDICTION OF THE COURT ATTACHED UPON THE FILING OF THE LIBEL CONTAINING THE REQUISITE JURISDICTIONAL ALLEGATIONS AND WAS PERFECTED UPON THE ISSUANCE OF A MONITION AND ITS SERVICE UPON THE CARGO OWNER. THEREAFTER THE RIGHT OF THE COURT TO PROCEED AND HEAR THE CASE ON THE MERITS WAS NOT DEFEATED BY THE MERE FILING OF DEFENSIVE PLEADINGS, ALTHOUGH PRESENTED WITH THE UTMOST GOOD FAITH

The District Court, having conceded "that freight-money due and payable constitutes a res of which an admiralty court has jurisdiction" (R. 30), proceeded to rule in effect that a mere bona fide denial of liability for freight by the cargo owner extinguished the *res* and defeated the jurisdiction of the court to proceed further. In this connection the court said (R. 30)—

> but to have that effect [to constitute a res] the freight-money must be actually due and liability for it must I think either be admitted by the person charged, or must be so clear and obvious as to leave no room for bona fide denial. The mere assertion that freight is due from a certain person, denied in good faith by the party charged, does not, it seems to me, create a res within the jurisdiction of the admiralty court. Such a claim might be made the basis of a suit. But a claim is not a res in this sense.

It will be observed that the denial of liability for freight in the instant case by the cargo owner did

not involve any dispute *about the carriage being actually undertaken and performed or of the existence of an agreement fixing the rate of freight therefor,* but consisted of allegations that the vessel was put to sea in an unseaworthy condition and without being adequately disbursed for the work (R. 18); that the voyage was inexcusably prolonged, whereby "the business of Palmer & Parker Company did suffer grievous hurt, and large losses of money were occasioned and incurred thereby" (R. 19), and general denials that the charterer had performed "the obligations upon it incumbent under the said charter-party of affreightment" and allegations of resulting indebtedness. (R. 20.)

We take all this to mean no more than that breaches of the contract of carriage by the charterer were asserted by the cargo owner to have caused the latter damages *which might or did equal or exceed the unpaid balance of the stipulated freight earned by the vessel and could be recouped.*

This was apparently the position taken by the Palmer & Parker Company at the hearing (R. 30):

> Palmer & Parker Company, on the other hand, contend that the steamer was unseaworthy and that this defect and deviation and delay caused damage to an amount largely in excess of the unpaid freight money; that no freight money is due; and that there is therefore no res and no basis of jurisdiction.

mere assertion of a co-extensive claim in recoupment or by set-off, when made in good faith, immediately ousts the court of jurisdiction to hear the case on the merits.

Furthermore, such a position tends to absurd and intolerable results. If it is correct, it is immaterial whether the alleged recoupment or set-off is well founded or not. It is enough that it is claimed in good faith. In that event a person in the position of the libellant would not only be deprived of all right to try out his case on the merits, but, in all cases where the claim is not *actually* well founded, he would be in the result deprived of the benefit of his contract and the property interest in the freights arising from the imposition of a lien thereon. It is submitted that the mere enunciation of such a result demonstrates the unsoundness of the decision below.

Moreover, the authorities dealing with the character of recoupment or set-off in admiralty proceedings clearly oppose themselves to any such results as have been reached in the court below.

In *Parsons on Maritime Law*, Vol. 2, in the chapter entitled "Of Set-Offs and Cross Libels," at page 717, it is asserted:

> If an action is brought for freight, it is held that damage done to the goods may be set off. So freight is to be deducted, if the suit is for damage done to the goods.

In *Snow* v. *Carruth*, 1 Sprague 324 (cited with approval in *Washington-Southern Navigation Co.*

v. *Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 629, 637), at page 326, the court said:

> Considering the question upon principle, there seems to be no reason for not allowing this defence. The libellant claims under a contract for freight. The defence goes to the question how much, if anything, he ought to recover for services under that contract. The claim and the defence are on the same contract, and the evidence necessary in each may, to a considerable extent, be the same, as, for instance, on the question of the delivery of the goods by the libellant.
>
> It is true, there is no general doctrine of set-off recognized in the admiralty; and if the damage to the respondent be greater than the whole freight, there can be no decree against the libellants for the excess.

In *Thatcher* v. *McCulloh*, Olcott's Reports, 365, 371, the following statement was made:

> In a special action for the loss sustained because of the circuity and delay of the voyage, the freighter might undoubtedly recover damages commensurate to any injury he could prove accrued from that cause; such cross-action might probably be sustained by the merchant, notwithstanding his acceptance of the cargo. * * * I perceive no objection to adjusting the equitable rights of the parties, without double action, by allowing, by way of recoupment of freight, the amount of damages sustained by the respondent by

> means of the breach of contract of affreightment in the deviation to Key West.

Kennedy v. *Dodge*, 1 Benedict, 311: Herein, at page 315 of the opinion, the court said:

> The only remaining question is, whether the damages of the respondents, arising out of this accident, can be recouped against the claim for freight, and if there is a balance in their favor, whether it can be recovered in this suit.
>
> That the damages suffered by the respondents can be recouped from the freight money, which the libellants would otherwise recover, appears to be settled upon authority. [Citing many cases.] By way of recoupment, the respondents can, as the damages arise out of the same transaction, extinguish a portion or all the claim of the libellants.

It is true that the authorities last cited deal with actions for the recovery of freight rather than with proceedings for the enforcement of liens upon subfreights. Once it is admitted, however, that a lien has been created of which admiralty takes cognizance, it must be further conceded as a corollary that a proceeding *in rem* is a proper remedy. Indeed, it appears to be the only remedy in the absence of any privity between the person asserting the lien and a resisting claimant. We are therefore unable to discern any difference in legal effect, so far as the principle involved is concerned, between these cases and cases where an owner seeks to enforce a lien given in respect to subfreights.

We are not, however, confined to reasoning based upon analogy, because the authorities dealing with the cases of subfreight definitely establish, or at least strongly indicate, that the principles and legal results are the same. *American Steel Barge Company* v. *C. & O. Coal Agency Co.*, 115 Fed. 669; *Freights of the Kate*, 63 Fed. 707; *Bank of British North America* v. *Freights, etc., of the Ansgar*, 127 Fed. 859; *Larsen* v. *150 Bales of Sisal Grass*, 147 Fed. 783; *Actieselskabet Dampsk. Thorbjorn* v. *Harrison & Co.*, 260 Fed. 287.

Finally, it would follow, *a fortiori*, that a mere general denial of liability by the cargo owner, though made in the utmost good faith, should not in reason or on principle operate to oust the court of jurisdiction which has attached at the time the libel is filed and a monition issued directing the payment of subfreights into the registry of the court.

III

THE ANALOGY SOUGHT TO BE DRAWN BY THE DISTRICT COURT IS INAPPLICABLE AND THE REASONS ASSIGNED FOR ITS DECISION ARE UNSOUND

The court stated that "No case in admiralty which throws much light on the question has come to my attention." (R. 31.) It is then asserted that there is a—

> rather close analogy in the jurisdiction of the bankruptcy court over summary proceedings brought by a trustee to recover in the hands of a third person property alleged to belong

> to the bankrupt estate. If the ownership is conceded to be in the estate summary process lies; and it also lies if the denial of the estate's title is obviously unfounded and colorable. But if the possessor of the property claims to own it in good faith, that is the end of summary jurisdiction. *In re Tarbox*, 185 F. R. 985. (R. 31.)

We are unable to discern any analogy. We understand that the cases of which *In Re Tarbox* is a type decide no more than that where the property is claimed in good faith adversely to the trustee, the claimant is entitled to have the matter tried out in accordance with the usual practice provided for the protection and benefit of litigants in the conduct of plenary suits.

The court further asserts that—

> With nothing but this [the provision in the charter party] to go on, the Government is in effect trying to cut in ahead of both the vessel and her charterer, and to compel the cargo-owner to pay to its [sic, it] sums which could not be recovered by either of the others—the result being (if the Government's position is sustained) that the cargo owner must pay to it the entire freight, although having suffered heavy loss by the bad condition and mismanagement of the vessel, and be remitted for reimbursement to a claim against a bankrupt concern into whose hands the Government placed her.

The Government is claiming no more than the right to have this counterclaim *tried out on the*

merits. The Government complains of no more than being deprived of the right to have the matter heard on the evidence. If the counterclaim is established by proof and its amount determined by evidence, the Government will not complain of any right to recoup. As the matter stands, however, the Government is deprived of its right to recover any of the subfreight remaining unpaid, *yet its vessel may be made subject to a maritime lien for the full measure of damages alleged to have been sustained as a result of breaches in the contract of carriage.*

IV

AS A FINAL CONSIDERATION IT MAY BE DOUBTED IF THE QUESTION RAISED BY THE CARGO OWNER AND DECIDED BY THE DISTRICT COURT AS A JURISDICTIONAL ISSUE WENT TO THE QUESTION OF JURISDICTION AT ALL

It is extremely doubtful if the question as to the existence of a *res* upon which a maritime lien could attach raised any jurisdictional issue at all in a strict sense. It doubtless went to the merits of the case and the right of the libellant to recover, but these are not jurisdictional considerations. (See *Sperry Gyroscope Co.* v. *Arma Engineering Co.*, 271 U. S. 232.) It follows as a corollary that the dismissal of a libel for lack of jurisdiction solely because the respondent pleads in good faith new matter which goes to the legal merits of the libellant's claim would be error.

In the case of *The Resolute*, 168 U. S. 437, this Court, through Mr. Justice Brown, made the following pertinent observations (p. 440):

> It is true that there can be no decree *in rem* against the vessel except for the enforcement of a lien given by the maritime law, or by a state law; but if the existence of such a lien were a question of jurisdiction, then nearly every question arising upon the merits could be made one of jurisdiction. Thus, supplies furnished to a vessel import a lien only when they are sold upon her credit; and the defence ordinarily made to such claims is that they were sold upon the personal credit of the owner or charterer; but certainly it could not be claimed that this was a question of jurisdiction. The existence of a lien for collision depends upon the question of fault or no fault, but it never was heard of that it thereby became a question of jurisdiction. Salvage services, too, ordinarily import a lien of the very highest rank; but it has sometimes been held that, if such services are rendered by seamen in the employ of a wrecking tug, or by a municipal fire department, no lien arises, for the reason that the men are originally employed for the very purpose of rescuing property from perils of the sea, or loss by fire. In the case under consideration a portion of the libellant's claim arises by assignment from Tellefson, and the authorities are almost equally divided upon the question whether such assignment carries

the lien of the assignor to his assignee. Obviously these are not jurisdictional questions.

See also *Hazelwood Dock Co.* v. *Palmer,* 228 Fed. 325; *Benedict on Admiralty,* Fifth Edition, Sec. 434, and the cases cited.

CONCLUSION

It is respectfully submitted that the decision of the court dismissing the libel for lack of jurisdiction should be reversed and the case remanded for a hearing on the merits.

WILLIAM D. MITCHELL,
Solicitor General.
GEORGE R. FARNUM,
Assistant Attorney General.
CLINTON M. HESTER,
W. CLIPTON STONE,
Special Assistants to the Attorney General.

MARCH, 1927.

○

INDEX

CITATIONS

Cases

STATUTES, ETC.

Supreme Court of the United States

OCTOBER TERM, 1926

No. 267

THE UNITED STATES OF AMERICA, APPELLANT,

v.

FREIGHTS, SUB-FREIGHTS, CHARTER-HIRE, AND OR SUB-CHARTER HIRE OF THE S.S. "MT. SHASTA"

BRIEF IN BEHALF OF PALMER & PARKER CO., APPELLEE

The official report of the opinion in the court below is—*"The Mount Shasta,"* 291 Fed. Rep. 92.

JURISDICTION OF THIS COURT

The grounds on which the jurisdiction of this court is invoked are as follows:

This is an appeal to this court taken by the United States from a final decree made by the United States District Court for the District of Massachusetts, sitting in admiralty, on March 17, 1925, dismissing the libel of the United States (Record, p. 29) upon the ground that the case did not "come within the admiralty jurisdiction" of that court (Record, p. 33).

From this decree the United States appealed directly to this court (Record, p. 32).

The appellee believes, and assumes, that the appeal is

based upon Sec. 238 of the Judicial Code, reading, prior to February 13, 1925, as follows:

> "Appeals and writs of error may be taken from the District Courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision . . . ."

This statute was amended by Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, but Section 14 of that act provides that it shall not affect the right to a review of a decree entered (as this decree was) prior to the date when the act takes effect, *i.e.*, May 13, 1925.

STATEMENT OF THE CASE

THE SINGLE, FUNDAMENTAL QUESTION NOW TO BE DECIDED IS WHETHER THE DISTRICT COURT HAD JURISDICTION OF THIS CASE.

The proceeding is in admiralty and purports to be a libel *in rem* brought by the United States against the "Freights, Sub-freights, Charter Hire, and/or Sub-charter Hire of the S.S. 'Mount Shasta.'" The District Court, after hearing, made a decree dismissing the libel (Record, p. 29), and has certified that "the judgment of dismissal herein is based solely on the ground that the sub-freights alleged to be due do not constitute a sufficient *res* to support an action *in rem*, and that therefore the case does not come within the admiralty jurisdiction of this court" (Record, p. 33).

It is agreed by the appellant and appellee,—

(1) That all allegations of fact contained in the special appearance of the appellee, filed November 13, 1922 (Record, p. 12), in the special appearance and objection of the appellee, filed November 16, 1922 (Record, p. 14), and in the answer of the appellee (Record, p. 15), may be taken as made in good faith;

(2) That all facts found by the Court, as set forth in the opinion (Record, pp. 29-32), may be taken as supported by the evidence and by admissions made in open court; and

(3) That the exceptions to the libel (Record, p. 5) and the answer (Record, pp. 6-10) are to be expunged from the record as having been included in it by mistake. (See Stipulation on file, Appendix A of this brief.)

The facts found by the District Court, and set forth in the opinion (Record, pp. 29, 30) are in substance as follows:

The "Mount Shasta" was a Shipping Board vessel which was chartered on May 19, 1920, to the Mount Shasta Steamship Co., by a demise charter which contained a provision that "the owner shall have a lien upon all cargoes and all

sub-freights for any amount due under this charter party" (Record, p. 29).

Under date of July 14, 1920, the Mount Shasta Steamship Co., through its agents, Fox & Co., made a cargo-charter of the steamer to Palmer & Parker Co., of Boston, for a voyage to the Gold Coast, to bring a cargo of mahogany logs from there to Boston, the Palmer & Parker Co. agreeing to furnish a full cargo and to pay a stipulated freight. By the terms of the sub-charter, 50 per cent. of the estimated freight was payable in New York upon advice from the master that the cargo had been loaded (Record, pp. 29, 30).

The steamer proceeded to Axim, on the Gold Coast, arriving there on August 7, 1920 (Record, p. 18); and at that port and at Secondi, another port near by, she loaded a cargo of mahogany logs. One-half of the estimated freight was paid by Palmer & Parker Co. in advance, and she began her voyage to Boston. She was much delayed by the failure of the Mount Shasta Steamship Co. and its agent, Fox & Co., to provide funds with which to pay for necessary coal, for the cleaning of the hull, and for necessary repairs to the machinery—so much delayed that the voyage, instead of occupying only about thirty days, as it should have, was not completed for about five months. This delay was caused entirely by the fault of the Mount Shasta Steamship Co. and its agents. Palmer & Parker Co., the owner of the cargo, was in no way responsible for it. Palmer & Parker Co., although under no obligation so to do, made from time to time cash advances, considerable in amount, to the master, to enable the steamer to proceed on her voyage (Record, p. 30).

Palmer & Parker Co. contended that the unseaworthiness of the vessel, and her deviations and delays, had caused it damage largely in excess of the unpaid portion of the freight money to be earned, and that no freight money was due (Opinion, Record, p. 30). This contention was made in good faith (Opinion, Record, p. 32).

Other allegations of fact made in the Answer filed by the appellee (Record, pp. 12, 14 and 15) which, it is provided

by the stipulation between the parties on file, are to be taken as made in good faith, are:

That Palmer & Parker Co. did not know until after the filing of the libel that the "Mount Shasta" belonged to the United States (Record, p. 16).

That the charter from the United States Shipping Board to the Mount Shasta Steamship Co. was a bare-boat or demise charter, and that the existence of it was unknown to Palmer & Parker Co. (Record, p. 16).

That this demise charter was drawn by the employees and counsel of the Shipping Board (Record, p. 16).

That Paragraph 10 of that charter gave to the Shipping Board the right, in case of default of the demise charterer, to "withdraw the said vessel from the service of the charterer" (Record, p. 17), and that the demise charterer was in default from and after August 1, 1920 (Record p. 18).

That possession and control passed under that charter to the demise charterer (Record, p. 17).

That Palmer & Parker Co. did not in fact know of the existence of the Mount Shasta Steamship Co., or that it had any interest in the premises (Record, p. 17).

That the "Mount Shasta" was not seaworthy, or fit for the voyage from the Gold Coast to Boston, that she deviated repeatedly from her proper course, and lay for a long time at Freetown, Africa, St. Vincent, Cape de Verde Islands, Dakar, Africa, and at Bermuda, awaiting disbursements necessary to enable her to proceed upon her voyage, which disbursements the Mount Shasta Steamship Co. and its agent, Fox & Co., failed to provide (Record, p. 18).

That the Shipping Board did not assert any right or interest in the vessel, or in the freight money, until after the cargo had been discharged and delivered to Palmer & Parker Co. clear of lien (Record, p. 19).

That the United States Shipping Board did not either withdraw the vessel from employment under the demise charter, or repossess itself of her, but permitted her to remain in the possession of the Receiver of the demise charterer until after the filing of this libel, and until long after the cargo had been delivered to Palmer & Parker Co., without reservation of

lien, or any bond or stipulation for the payment of freight (Record, p. 19).

The answers to the interrogatories also contained evidence that the cargo of mahogany logs was, after months of delay, delivered at Boston in a worm-eaten and damaged condition and that, in addition to the 50 per cent. of the estimated amount of freight—which amounted to $52,500—paid by Palmer & Parker Co. to Victor S. Fox & Co. when the vessel sailed from the Gold Coast, additional sums, amounting to upwards of 4,347£ sterling, were paid by Palmer & Parker Co. on account of freight during the voyage, in order to enable the vessel to proceed upon her course (Record, p. 27).

Upon the filing of the libel, the warrant and monition issued (Record, p. 4), and were duly returned by the Marshal into the District Court (Record, p. 5).

Neither the monition nor the warrant named or mentioned Palmer & Parker Co. The Marshal's return shows that he advertised the substance of the monition in the *Boston Marine Guide* and posted a notice of it in the courthouse at Boston, and also gave a copy of it, in hand, to the vice-president of Palmer & Parker Co. He did not take into custody, seize or arrest, anything whatever, nor did he attempt to do so.

On November 7, 1922, the libellant moved that Palmer & Parker Co. be ordered to pay the freight moneys into court (Record, p. 11). On November 13, 1922, that motion was set down for hearing (Record, p. 12), and on that day Palmer & Parker Co. filed a special appearance (Record, p. 12) denying that process had issued against it in due form of law, citing it to show cause why the freight money should not be paid into court. In this special appearance it also denied that either at that time, or at the time of filing the libel, it had "in its hands and possession any sum of money or any fund to which the libellant may in any wise lay claim" or "in its hands and possession any property capable of seizure and arrest by process issued . . . in the above entitled cause," or that there was, at the time, in the custody of the

district court, "any property seized or arrested pursuant to process issuing out of this honorable court in the above entitled cause to which Palmer & Parker Co. has at any time laid claim, or now claims." This special appearance concludes with a specific denial of the jurisdiction of the District Court, and with the prayer that the motion to compel Palmer & Parker Co. to pay freights into court be denied.

The libellant's motion that Palmer & Parker Co. be ordered to pay the freights into court was never passed upon by the court. On December 5, 1922, the case came on for hearing before the district judge, and on July 2, 1923, his opinion was filed.

On March 21, 1925, the final decree was entered in accordance with that opinion, and from this final decree the libellant has appealed.

SUMMARY OF THE ARGUMENT

A. The District Court had no jurisdiction of this proceeding *in rem* because there was no "res".

B. The District Court had no jurisdiction of this proceeding because, even if there had been a "res", it was never within the custody of the Court.

C. The District Court had no jurisdiction of this proceeding for the reasons stated by it in its opinion.

ARGUMENT

The position of Palmer & Parker Co., the appellee, is,—

That the decree dismissing the libel should be affirmed:

A. Because there was here no "res" of which a Court of Admiralty could have jurisdiction in a proceeding *in rem*.

B. Because, even if there had been here such a "res", that "res" was never "within the lawful custody of the Court."

C. For the reasons stated in the opinion of the District Court.

A. THERE WAS HERE NO "RES" OF WHICH A COURT OF ADMIRALTY COULD HAVE JURISDICTION IN A PROCEEDING *in rem*.

It is important to have clearly in mind from the outset just what it was here against which the libellant purported to proceed *in rem*, and over which the court was asked to exercise jurisdiction *in rem*.

There was, on the one hand, a *chose in action*, a claim in favor of "Victor A. Fox & Co., Agents of the S.S. 'Mount Shasta'" and against Palmer & Parker Co., in the general nature of a claim for failure to perform a contract, that contract (embodied in a charter party) being an agreement to pay to Fox & Co. freight at the rate of $25 per ton of cargo.

There was, on the other hand, a contention by Palmer & Parker Co.—expressly found by the court to be made in good faith—that it was not liable for any amount whatever, and that the steamship and Fox & Co. were liable to it for much more than the "sums claimed to be due as freight and demurrage" (Record, p. 32),—for a number of reasons, which may be thus summarized:

> Because Fox & Co. had not performed its own obligations under the charter party.
>
> Because the vessel had not proved to be "tight, staunch, strong and in every way fitted for such voyage," but unseaworthy—a breach of an obligation specifically assumed by Fox & Co. in the charter party.
>
> Because Fox & Co. had not furnished the vessel with the money required to provide coal and other necessaries, and to pay for repairs needed to enable her to make the voyage.
>
> Because she had deviated and delayed, and had consumed five months in making a voyage which should have been accomplished in 30 days.
>
> Because Palmer & Parker Co.'s cargo had, after these delays, been delivered in Boston in a worm-eaten and damaged condition.
>
> Because one-half of the freight money had been paid in advance.
>
> Because further sums, amounting to some £4,347 (value in U. S. currency uncertain because of varying rates of exchange, etc.), had been paid by Palmer & Parker Co.

on account of the freights to be earned, in order to make it possible for the vessel to proceed upon her voyage. (Opinion, Answer and Answers to Interrogatories, as above.)

For two very recent and instructive decisions of a court of last resort, in cases between other parties, but arising out of this very voyage of this same vessel and these same facts, and showing the importance of these facts, see

Commercial Trust Co. v. *American Trust Co.*, 245 Mass. 166.

Commercial Trust Co. v. *American Trust Co.*, decided May 27, 1926, 256 Mass. 58.

The fundamental question of the case is,—

DOES THIS CLAIM, EXISTING UNDER THESE CIRCUMSTANCES, CONSTITUTE IN ITSELF, AND WITHOUT MORE, SUCH A "RES" AS MAY BE PROCEEDED AGAINST BY AN ADMIRALTY PROCEEDING *in rem?*

The position of Palmer & Parker Co. is that it does not.

". . . the distinction is sharply drawn between a common law action *in personam* with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding *in rem* against the vessel as the debtor or 'offending thing,' which is the characteristic of a suit in admiralty. The same distinction is carefully preserved in the general admiralty rules prescribed by this court; rule second declaring that in suits *in personam* the mesne process may be 'by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for'; and rule nine, that in suits and proceedings *in rem*, the process shall be by warrant of arrest of the ship, goods or other things to be arrested, with public notice to be given in the newspapers. The former is in strict analogy to a common law proceeding and is a concurrent remedy. The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts."

The "Robert W. Parsons," 191 U. S. 17 (at p. 37).

(Italics in the following quotations ours.)

"Actions *in rem* are prosecuted to enforce a right *to things arrested*, to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which *the thing to be made responsible is proceeded against* as the real party, but actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other."

The "Sabine," 11 Otto, 384, 388.

"*The foundation of jurisdiction* in rem *is the taking of the vessel into the custody of the court*, and the characteristic virtue of a proceeding *in rem* is that it operates directly upon the *res* as . . . the actual subject matter of the jurisdiction. . . ."

Benedict on Admiralty, 5th Ed., Vol. I, Ch. 3, Sec. 11 (p. 16).

"Process *in rem* is founded on a right in the thing and the object of the process is to hold the thing itself. . . . The court arrests the thing for the purposes of satisfaction. *It holds its possession by its officers, and the property in contemplation of law is in the custody of the court itself.*"

Benedict on Admiralty, 5th Ed., Vol. I, Ch. 23, Sec. 297 (p. 369).

"Admiralty proceedings fall under two great classes—proceedings *in rem* and proceedings *in personam*. In the first, *the thing itself* against which the right is claimed or liability asserted *is proceeded against by name, as a contracting or offending entity, arrested or taken into legal custody*, and finally sold to answer the demand, unless its owner appears and releases it by bond or stipulation."

Hughes on Admiralty, 2d Ed. (p. 400).

"In ordinary suits of foreign attachment in the state courts, the debtor is defendant by name, and, if he appears, a personal judgment may be rendered against him; but not so in admiralty suits *in rem*, for the real defendant

there is the *vessel or other property*, and the owner appears not as defendant, but as claimant."

Hughes on Admiralty, 2d Ed. (p. 401).

"In all cases of seizure, and in other suits and proceedings *in rem*, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and *the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody*, etc., etc."

Admiralty Rule 10.

"All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; *and, if the libel be* in rem, *that the property is within the district*, etc., etc."

Admiralty Rule 22.

See, also,

Cooper v. *Reynolds*, 10 Wallace, 308 (316, 317) by Miller, J.

"Jurisdiction *in rem* depends solely on the physical control of the *res* by the sovereign exercising jurisdiction. . . . The typical example of jurisdiction *in rem* is the jurisdiction of the Court of Admiralty over any vessel within the territorial waters of its sovereign."

"The Exercise of Jurisdiction *in rem* to Compel Payment of a Debt," by Prof. Joseph Henry Beale, Harvard Law Review, Vol. 27, No. 2, December, 1913.

"The foundation of jurisdiction is physical power."

Holmes, J., in *Ex parte Indiana Transportation Co.*, 244 U. S. 456, 457.

In a proceeding *in rem*, where there is no personal defendant, the "physical power" which constitutes the "foundation of

jurisdiction" must, of necessity, be "physical power over the thing proceeded against." If there be no such physical power over it, there can be no jurisdiction.

The general result of these authorities is to establish that the jurisdiction *in rem* of the admiralty is founded upon physical power over the "res," and upon the theory that the "res" proceeded against is "a contracting or offending entity," either a "debtor or 'offending thing'" (in the language of this court in the "*Robert W. Parsons*," supra, p. 11), a thing which can be "arrested" and "taken into custody," which can be fairly designated as "tangible property," or the proceeds of tangible property, and is physically within the territorial jurisdiction of the court—in the case of the district courts of the United States, "within the district."

This claim against Palmer & Parker Co., a disputed *chose in action*, falls far short of fulfilling these requirements. It is not, of course, in any sense a physical entity, but a pure abstraction, a mere intellectual concept. It cannot possibly be regarded as a "contracting entity"; such terms as "arrest" and "take into custody" can have no proper application to it; it is certainly not tangible property or its proceeds; and it cannot properly be described as being "within the district" of the court.

It is, moreover, a claim unliquidated in form, uncertain in amount, disputed in fact, and of wholly uncertain, if any, value.

It lacks, therefore, substantially all the required elements and attributes of such a "res" as may constitute the sole object of a proceeding *in rem* in a court of admiralty. It is no more such a "res" than would be a pending claim to recover damages, or compensation, for a tort.

It is submitted, with confidence, that no decision of this court, and no decision of any Circuit Court of Appeals, can be cited which holds that a claim such as this one of Fox & Co. against Palmer & Parker Co. can be proceeded against in the admiralty by means of a libel *in rem*, at least as the sole "res."

The libellant here undertook to rely in the District Court upon the opinion of Putnam, J., in *American Steel Barge Co. v. Chesapeake & Ohio Coal Agency Co.*, 115 Fed. Rep. 669. One obvious and important, perhaps controlling, distinction between that case and this present one is that in that case "there seems to have been no question as to the freight being due," as is pointed out by Morton, J., in his opinion (Record, p. 31, top).

Moreover, in the *American Steel Barge Co.* case, the court was not in fact dealing with freights, or freight money, at all. The libel did purport to be filed by the libellant against "the cargo of coal now or late on board its Steamer 'City of Everett' and the freight on said cargo of coal," and a warrant issued purporting to run against the cargo and freights, but, as is shown by the Marshal's return, execution of it was stayed before service by his receiving from the claimant *of the cargo of coal*, a bond, reciting the filing by the obligor of a claim to "said cargo" only. The result was that the court had within its jurisdiction, and subject to the exercise of its power, only bail for the coal itself, and not the freight money, any substitute for it, or anything representing it.

Under these circumstances, the decision is to be taken as applicable to the cargo of coal only. So far as the opinion purports to deal with the claim for freight, it is *obiter dictum* only, and the decision is in no sense an adjudication that a mere claim for freight money can constitute a "res"; no such claim was before the court or within the scope of its powers. The court was in fact dealing with a cargo of coal only.

The report of the case in 115 Federal Reporter does not suffice to make clear what has just been said, but there is annexed to this brief, in the form of an appendix (Appendix B), a certified copy of the libel, the warrant, and the Marshal's

return, which show the facts stated above. Besides, the report of the case in the District Court, 107 Fed. Rep. 964, shows plainly that only the cargo of coal was before the court. The opening language of that report is: "In Admiralty, Libel of *cargo* under claim of lien, etc."

The opinion of the District Court states: "The lien on sub-freight given by the charter does not help the libellant, which here seeks to enforce *not a lien on freight, but a lien for freight*" (p. 972, top).

It is further submitted that the opinion of Putnam, J., in this case is, in any event, obscure and unsatisfactory, and fails signally to make clear the principles of law upon which it proceeds.

None of the authorities cited in his opinion hold that an unpaid and unliquidated claim for freight can constitute, in and of itself, a "res" such as can serve as the basis of an admiralty proceeding *in rem*. Indeed, the cases cited by the opinion are all proceedings *in personam*, except *"The Karnak"* and *"The Salacia,"* which are cited upon an entirely different point.

Other cases, upon which the libellant has either relied in the District Court, or may seek to rely here, are:

Frontier S.S. Co. v. *Central Coal Co.*, 234 Fed. Rep. 30.
Vane v. *Wood Co.*, 231 Fed. Rep. 353.
Bank of British North America v. *Freights*, 137 Fed. Rep. 534.
Freights of the "Kate," 63 Fed. Rep. 707.
The "Giles Loring," 48 Fed. Rep. 463, 473.
The "Conveyor," 147 Fed. Rep. 586.

Of these cases, *Frontier S.S. Co.* v. *Central Coal Co.*, *Vane* v. *Wood Co.*, and *The "Giles Loring"* are all libels *in personam*, and do not present, or decide, any such question as is at issue here.

Bank of British North America v. *Freights* is a libel *in rem*; but in that case, not only was the liability for freight undis-

puted, but the freight money had actually been collected and deposited in a bank in New York, where it constituted a defined, liquidated fund within the jurisdiction and power of the court.

> "The 'Ansgar' arrived at New York April 10, 1901, and the 'Hutton' April 26, 1901. Perry collected the freights, and of the amount he deposited about $39,000 to the credit of his account in the Bank of New York" (p. 536, top).

> "These actions were brought by the libellant, the Bank of British North America, to recover certain moneys on deposit with the Bank of New York. The moneys are alleged to be the earnings and freights of the steamships 'Ansgar' and 'Hutton' and were deposited by Edward Perry, the charterer of the steamers, who, upon their arrival in New York, collected the moneys and deposited them to his own credit in the said bank in 1901" (same case in the District Court—127 Fed. Rep., pp. 859-860).

In *Freights of the "Kate,"* there was no question of a claim for unpaid freights. The freights had been paid, and, not only had they been paid, but they had been "deposited subject to the order of the court" (p. 709).

"The Conveyor" was a libel for seamen's wages and supplies, and the "res" with which the decision dealt was the proceeds of the insurance policy upon the vessel, which had been deposited as a fund, and was within the jurisdiction of the court. The proceeds of this policy were, of course, incidental to, and represented, the vessel herself, which was the principal "res" of which the court had already acquired jurisdiction.

No authority has been found, and it is submitted with confidence that no respectable authority can be found, in which it has ever been decided that any unpaid and disputed claim for freight, or even any *unpaid* claim of that nature, whether disputed or undisputed, has ever been held to be such a "res" as can be of itself, without more, the sole subject of a proceeding *in rem* in the admiralty.

B. EVEN IF THERE HAD BEEN HERE SUCH A "RES," THAT "RES" WAS NEVER "WITHIN THE LAWFUL CUSTODY OF THE COURT."

> "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit *in rem* for the breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and second, *that the property proceeded against is within the lawful custody of the court.* These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits." (Italics ours.)
>
> Brown, J., in *"The Resolute,"* 168 U. S. 437 (at p. 439).

The second requirement necessary to give to a court of admiralty jurisdiction *in rem*, as here stated by Brown, J., for the court, is that

> "the property proceeded against is *within the lawful custody of the court.*"

Not only must what is proceeded against be "property," as we have argued above, but the existence of jurisdiction presupposes that this property is within the lawful custody of the court.

Now, in our case, even if what was proceeded against, *i.e.*, the claim for freight money, could be properly designated as "property," it certainly was not within the custody of the court. Indeed, to get it within the custody of the court was the very thing which the libellant was trying to do and failed to accomplish. The Marshal did not seize anything. Palmer & Parker Co. did not pay over anything. On the contrary, they denied that there was anything to be paid over. The libellant filed a motion that they be ordered to pay into court. Such a motion necessarily presupposes that whatever it seeks to have paid over is not already in the custody of the court — if it were, the motion would be meaningless. That motion was never allowed.

The "custody" of property is a physical matter, and implies immediate physical control. There never was, in this case, anything whatever "within the lawful custody of the court."

The libellant has sought to rely in this connection upon the provisions of Admiralty Rule 37.

The obvious and conclusive answer to any such effort is that no court can, by its own rule, or by action under such a rule, confer jurisdiction upon itself. Any grant of jurisdiction to a court must, of necessity, come from the law-making power of the sovereign. The only possible source of jurisdiction in a court of the United States is legislation by Congress or a grant of power in the Constitution.

> "But no rule of court can enlarge or restrict jurisdiction."
>
> *Washington Southern Co.* v. *Baltimore & P. Steamboat Co.*, 263 U. S. 629, 635.

The only source of admiralty or maritime jurisdiction is the Constitution. Even Congress cannot enlarge the admiralty jurisdiction of the courts of the United States. (1 Kent's Commentaries, 13th Ed., p. *372.)

Neither Admiralty Rule 37, nor any other rule of court, can give to a district court of the United States any admiralty or maritime jurisdiction not already given to it by the Constitution.

It may be, however, that the argument of the libellant is meant to be one to the effect that the language of Rule 37 leads to the inference that the court which made that rule believed that jurisdiction *in rem* existed over a claim such as

the libellant in this case is seeking to proceed against, without such jurisdiction already existing over some principal "res" to which this claim is appurtenant or incident. It is submitted that the rule, fairly interpreted, does not lead to that inference, because its language—

> "Where freight, or other proceeds of property (are *attached to, or bound by*, the suit, which are in the hands or possession of any person, the court may, etc., etc."

does not, properly construed, refer to that actual physical "res" which constitutes the subject matter of the proceeding *in rem* and is already within the power of the court, but only to some appurtenance, or incident, of such a "res." The words "attached to, or bound by, the suit," are not appropriate to describe the principal "res" itself against which the proceeding is brought. Rule 37, it is submitted, is a rule of the same general nature as Rule 9—Rule 9 applying in suits against a ship, or its appurtenances, and Rule 37 in other proceedings *in rem*—the purpose of both rules being to bring within the physical power of the court mere incidents, or appurtenances, or proceeds, of some principal thing (*i.e.*, the "res" proceeded against) already within its power.

In other words, process under these two rules is merely auxiliary to a suit *in rem* already pending against some "res" already in the custody of the court.

> ". . . and where they (that is, Courts of Admiralty) have jurisdiction of the principal matter, it is suitable, and according to the analogies of law, that they should possess it over the incidents."
>
> 1 Kent's Commentaries, 13th Ed. p. *371, foot.

> "If the admiralty has cognizance of the principal thing, it has also of the incident, though that incident would not, of itself, and if it stood for a principal thing, be within the admiralty jurisdiction."
>
> 1 Kent's Commentaries, 13th Ed. p. *379.

Process under Rule 9, formerly Rule 8, has been described thus:

"The process to be first issued under this rule is auxiliary to a suit *in rem*."

Conkling's Admiralty Practice, 2d Ed., Vol. 2, pp. 155–56.

Even if an unpaid claim for freight money might, *as an incident of some principal thing or* "res," be within the cognizance of the admiralty in a proceeding *in rem*, still it cannot, if it must stand itself alone, as, and for, a principal thing, be the object of such a proceeding.

C. The reasons stated in the opinion of the District Court.

The appellee, in addition to what has been said above, relies also upon the arguments set forth, and upon the authorities cited, in the opinion of the District Court, but it seems unnecessary to undertake to repeat, or to restate, these here.

Other authorities to the same general effect as *In re Tarbox*, 185 Fed. Rep. 985, cited in that opinion, are:

Louisville Trust Co. v. Comingor, 184 U. S. 18.

First National Bank of Chicago vs. Chicago Title & Trust Co., 198 U. S. 280, 289, 290.

In re Hayden, 172 Fed. Rep. 623, and authorities there cited.

SUGGESTION

The appellee suggests that the District Court could not, in any event, have entertained this proceeding *in rem*, so-called, because it was not founded upon a maritime lien, which is the necessary basis of every admiralty proceeding *in rem*.

> "A maritime lien is said by writers upon maritime law to be the foundation of every proceeding *in rem* in the Admiralty."
>
> Brown, J., in *"The Corsair,"* 145 U. S. 335 (at p. 347).

> "It is true that there can be no decree *in rem* against the vessel except for the enforcement of a lien given by the maritime law, or by a state law."
>
> Brown, J., in *"The Resolute,"* 168 U. S. 437 (at p. 440).

> "Whether to proceed *in rem* or *in personam* in a given case is rather a question of substantive law than of practice. It depends on the question whether there is an admiralty lien, etc."
>
> Hughes on Admiralty, 2d Ed., p. 400, foot.

> "A maritime lien is the necessary basis for every admiralty proceeding *in rem*. Such a lien is a right of property and not a mere matter of procedure. The courts cannot create a new lien."
>
> Benedict on Admiralty, 5th Ed. Vol. 1, Ch. 3, Sec. 11, (pp. 14 and 15).

Such a maritime lien is the creature of the admiralty law. It is a *jus in re*, and *stricti juris*—a right closely resembling the *"privilegium"* of the civil law, a right which cannot be created by act of the parties, but is created only by admiralty jurisprudence.

> "It follows out the same principal that Mr. Justice Curtis states in *The Kiersage*," 2 Curt. 424, Fed. Cas. No. 7,762, that *admiralty liens are* stricti juris, *and that*

they cannot be extended argumentatively, or by analogy or inference. He says, 'They must be given by the law itself, and the case must be found described in the law.'"

Osaka v. Pacific Export Lumber Co., 260 U. S. 490 (at p. 500).

"The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is, therefore, *stricti juris*, and will not be extended by construction, analogy or inference."

Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1 (at p. 12).

See, also,

Osaka v. Pacific Export Lumber Co., 260 U. S. 490 (at pp. 497, 499, 500).

"The Yankee Blade," 19 How. 82, 89.

There is no authority for a maritime lien in favor of a shipowner upon sub-freights created by admiralty jurisprudence.

Whether or not such a maritime lien existed here is not, however, in view of the decision of this court in *"The Resolute"* 168 U. S. 437, a question of jurisdiction, and it is the understanding of the appellee that, upon this appeal, only the question of jurisdiction is presented for decision and is open for argument.

See *Male v. Atchison, T. & S. F. Ry. Co.*, 240 U. S. 97 (at p. 101).

Mitchell Coal Co. v. Pennsylvania R.R. Co., 230 U. S. 247 (at p. 255).

Hegarty v. Southern Pacific Co., 228 U. S. 137 (at p. 144).

GASTON, SNOW, SAUNDERS & HUNT,
ROBERT H. HOLT,

Proctors for Palmer & Parker Co.

THOMAS HUNT,
JOHN H. LOWRANCE,

Of Counsel.

APPENDIX "A"

SUPREME COURT OF THE UNITED STATES
October Term, 1926

THE UNITED STATES OF AMERICA, *Appellant* v. FREIGHTS, SUB-FREIGHTS, CHARTER HIRE, AND OR SUB-CHARTER HIRE OF THE S.S. "MOUNT SHASTA"	No. 267

STIPULATION

By reason of certain omissions of material evidence from the record, and for the purpose of supplying the same, it is stipulated and agreed that the Court, in considering the jurisdictional question certified, take all allegations of fact contained in the special appearance of the appellee, filed November 13, 1922 (R. p. 12), the special appearance and objection of the appellee, filed November 16, 1922 (R. p. 14), and the answer of the appellee, filed November 27, 1922 (R. p. 15), as having been made in good faith, and all facts purported to have been found by the Court, as set forth in the opinion, as having been supported by the evidence, and by admission made in open court.

It is also stipulated and agreed that the exceptions to libel, appearing on page 5, and the answer, appearing on page 6 and continuing through page 10, shall be expunged from the record, said pleadings having been filed by inadvertence, never considered by the District Court, and included in this record by mistake.

WILLIAM D. MITCHELL,
Solicitor General for the Appellant, United States of America.

GASTON, SNOW, SALTONSTALL & HUNT,
Attorneys for Palmer & Parker Company, Appellee.

APPENDIX "B"

To the Judge of the District Court of the United States within and for the District of Massachusetts:

The American Steel Barge Company, of New York, N.Y., a corporation duly established by law under the laws of the State of New York, exhibits this its Libel and Complaint against *the cargo of coal* now or late on board its Steamer "City of Everett" *and the freight on said cargo of coal*, accruing under certain Bills of Lading dated December 30, 1898, at Newport News, and signed by W. W. Dalzell, master of said Steamer as more fully below set forth, in a cause of contract civil and maritime. And thereupon said Libellant alleges and articulately propounds as follows:

1. At the various dates below mentioned, it was, and it now is, the owner of the Steamship "City of Everett," of Everett, Washington, a vessel of 1732.80 tons net register.

2. On or about March 1, 1898, at New York, N.Y., there was made between it and the Atlantic Transportation Company, a corporation established under the laws of New Jersey and having a usual place of business in said New York, a written agreement of Charter Party, a copy whereof the Libellant asks leave to produce at the hearing of this case, whereby it let and said Atlantic Transportation Co. hired, for one year from April 5, 1898, the said Steamer "City of Everett," for the sum of $2,812.50 per month, to be paid monthly in advance, commencing from said April 5, 1898.

3. Under and according to said Charter Party there was due said Libellant on December 5, 1898, the stipulated sum of $2,812.50, being the monthly hire of said Steamer then to be paid in advance according to said Charter Party. Yet, though requested, said Atlantic Transportation Co. has not paid and still neglects and refuses to pay the said sum, and the same is now due and payable to said Libellant.

4. In and by said Charter Party it was expressly agreed that said Libellant should have a lien upon all cargoes and all sub-freights for charter money due under said Charter Party.

5. On or about December 30, 1898, there was shipped on board said Steamer at Newport News, Va., for transportation to Boston, consisting of about 3843 tons New River Steam Coal, consigned to C. H. Sprague & Son or their assigns at said Boston. Bills of Lading were signed and issued by the master of said Steamer for said cargo by the direction of said Charterer or its agents, according to which said cargo was to be delivered at Boston to said C. H. Sprague & Son or their assigns he or they paying freight for the said coal "as agreed." The Libellants are ignorant what rate of freight was agreed between said shipper and charterer and cannot therefore state the amount thereof.

6. Said Steamer thereafter sailed from Newport News with said cargo on board and on January 9, 1899, arrived at Boston and has made due delivery of said cargo according to said Boston and has earned the freight thereon. The above shipment transportation and delivery were all within the period covered by said Charter Party, and the freight on said cargo under said Bill of Lading is a sub-freight within the provisions of said Charter Party.

7. Said cargo of coal and said consignees and their said assigns whom the Libellant is informed and believes and therefore alleges to be the Metropolitan Coal Company of said Boston are all at said Port of Boston and within the jurisdiction of this Court.

8. All and singular the premises are true and within said jurisdiction.

WHEREFORE said Libellant, claiming a lien upon said cargo and said sub-freight thereon according to said Charter Party to the amount of the Charter hire due and unpaid as above, prays as follows:

(1) That process in due form of law may issue against said cargo of coal and against said sub-freight thereon.

(2) That all persons having any interest in said cargo

or said sub-freight may be summoned to appear and answer the premises.

(3) That the Court will decree in its favor for the amount of Charter hire due and unpaid as above and order the same to be paid with their costs.

(4) That said cargo may be ordered by the Court to be sold and the proceeds thereof applied to said payment.

(5) That said C. H. Sprague & Son and said Metropolitan Coal Co. may be ordered by the Court to pay into Court the freight due on said cargo under said Bill of Lading, whatever its amount may be or from whichever of them it may be due and that the same may be applied to the payment of the decree prayed for above.

(6) For such other and further relief as law and justice may require.

FREDERIC DODGE
EDWARD S. DODGE } *Proctors*

THE AMERICAN STEEL BARGE COMPANY
By FREDERIC DODGE
its Atty.

UNITED STATES OF AMERICA
STATE AND DISTRICT OF MASS.
SUFFOLK ss.

On this thirteenth day of January 1880 personally appeared before me at Boston in said County, the above named Frederic Dodge and made due oath that the statements of the foregoing *libel*, by him subscribed on behalf of the libellant are true to the best of his knowledge information and belief. Witness my hand and Notarial Seal.

CHARLES WALCOTT
Notary Public

(SEAL)

ENDORSED.
Mar T. 1901.

AMERICAN STEEL BARGE COMPANY

v.

CARGO OF COAL EX. STEAMER "CITY OF EVERETT" AND THE FREIGHT THEREON, &c.

LIBEL.

WARRANT & MONITION
issued returnable
Jan 27th 10 A.M.

UNITED STATES DISTRICT COURT
Filed in clerk's office
Mass. Dist. Jan 13 *1899*

Massachusetts District, ss. } The President of the United States of America, To the Marshal of said District, or either of his Deputies, Greeting.

(Seal) We command you that you give notice to all persons concerned, that a Libel is filed before the Honorable Francis C. Lowell Esquire, Judge of the District Court for said District, by

The American Steel Barge Company of New York, N.Y., *Libellant*,

against

The cargo of coal now or late on board steamer "City of Everett" and the freight on said cargo of coal

And against all persons lawfully intervening for their interest therein, in a cause of contract Civil and Maritime. And that trial will be had on said Libel at a District Court to be holden at the United States Court House in Boston, in said District of Massachusetts, on Friday the twenty-seventh day of January 1899 at ten o'clock A.M. And you are to give said notice by advertising the same in the *Boston Daily Advertiser* one of the public newspapers printed at Boston and by posting a copy of the same notice at the said Court House in Boston, seven days at least before said day of trial. And you are to take the said Cargo of coal and the freight thereon into your custody.

And make due return hereof, with your doings herein.

Witness, the Honorable Francis C. Lowell Esquire, at Boston, this thirteenth day of January A.D. 1899.

Frank H. Mason, *Clerk*.

United States of America.

Massachusetts District, ss. January 16 1899

I hereby certify that the execution of the within warrant has been stayed before service on my receiving this day a bond from the claimant of the cargo of coal against which said warrant was issued under the provisions of section 941 of the Revised Statutes of the United States approved by the Judge of the District Court of the United States for the said District of

Massachusetts in which the within named cause is pending, and that I have returned the said bond to the said Court.

HENRY W. SWIFT
U. S. Marshal

ENDORSED:
1021 980
AMERICAN STEEL BARGE CO.
Libl.
vs.
CARGO OF COAL EX STEAMER
CITY OF EVERETT & FREIGHT

WARRANT AND MONITION.

United States
Room 101 P.O. Building
Jan 16 1899
Boston, Mass
Marshal's Office.

UNITED STATES DISTRICT COURT
Filed in clerk's office
Mass. Dist. Jan 17 1899

KNOW ALL MEN BY THESE PRESENTS, that The Chesapeake and Ohio Coal Agency Company, a corporation duly established by law under the laws of the State of New Jersey, having its usual place of business at New York City, is holden and stands firmly bound and obliged to Henry W. Swift, Marshal of the United States for the District of Massachusetts or his successors in said office, in the full and just sum of two thousand five hundred and fifty dollars to the payment whereof it binds itself and its successors firmly by these presents. IN WITNESS WHEREOF it has set its corporate seal and caused these presents to be subscribed by C. B. Orcutt its President thereto duly authorized, this fourteenth day of January 1899.

The condition of this obligation is such, that WHEREAS

there has been filed in the District Court of the United States within and for the District of Massachusetts by The American Steel Barge Company, a corporation duly established by law under the laws of the State of New York a libel in Admiralty against a cargo of coal on board its steamer "City of Everett" and now at Boston in said District, and against the freight due thereon, to recover certain moneys alleged in said libel to be due to it for charter hire under a certain Charter Party in said libel referred to, —

And whereas process *in rem* has been issued by said Court on said libel, directing said Marshal to arrest said cargo of coal and said freight due thereon, and said Chesapeake and Ohio Coal Agency Company has filed its claim to said cargo, and desires to stay the execution of said process by giving bond as provided by law, —

And whereas it is agreed by said libellant that the amount of the bond to be so given, instead of being double the amount claimed by said libellant, may be the sum above named.

Now, therefore, if the said Claimant shall answer the decree of the Court in said cause and abide by all orders or decrees, interlocutory or final of said Court, and shall pay the amount of the final decree of the Court, and all sums of money that it shall be ordered to pay by the final decree of the Court, whether it be in this or in any appellate Court, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

Chesapeake & Ohio Coal Agency Co.
Per C. B. Orcutt
(Seal) *President*

January 16 1899
The above Bond is approved by the Court.
Francis C. Lowell
U. S. Dist. Judge

The libellant agreeing to limit its claim against the cargo to the freight money earned upon the cargo referred to in the libel, and to claim a lien on the cargo only in the amount of such freight money, it is agreed that such freight money

amounts to $2,550., and that bond be given in that amount, all without prejudice to the defenses of the Chesapeake and Ohio Coal Agency Company that no lien exists upon the cargo in favor of libellant to that or any amount, and that no such lien exists in any event for a greater amount than the amount of freight actually due and unpaid on arrival.

50 cent revenue stamp documentary cancelled

FREDERIC DODGE
for libellant Am. St. Bge Co.

J. B. WARNER for Chesapeake & Ohio Coal Agency Company

approved

STETSON, JENNINGS & RUSSELL
Counsel for claimant.

BUTLER, NOTMAN, Jo- - - &Ny- - - - - - -

Counsel for Libellant

ENDORSED
986
The Chesapeake & Ohio Coal Agency Company,
-to-
Henry W. Swift, Marshal &c.

BOND.

The within bond is accepted and agreed to by libellant who consents to the amount stated and that no sureties need be given.

AMERICAN STEEL BARGE CO.
by their Proctor
FREDERIC DODGE.

UNITED STATES DISTRICT COURT
Filed in clerk's office
Mass. Dist. Jan 17 1899

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MASSACHUSETTS

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing are true copies of the Libel filed January 13, 1899, Warrant and Monition, issued January 13, 1899, and of Bond, filed January 17, 1899, with all the endorsements thereon, in the cause in said District Court, entitled,

No. 986 Civil.

AMERICAN STEEL BARGE COMPANY
Plaintiff,

v.

CARGO OF COAL EX. STEAMER "CITY OF EVERETT" AND THE FREIGHT THEREON &C.
Defendant,

now determined in said District Court.

[SEAL]

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this twenty-third day of March, A.D. 1927.

JAMES S. ALLEN
Clerk.